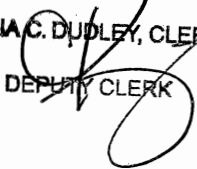


OCT 25 2017

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

JULIA C. DUDLEY, CLERK  
BY:   
DEPUTY CLERK

AMIE NICOLE LYNCH HICKS,

Plaintiff,

v.

NANCY A. BERRYHILL,<sup>1</sup>

Acting Commissioner of Social Security,

Defendant.

)  
)  
) Case No. 7:16cv00293  
)  
)

) By: Michael F. Urbanski  
) Chief United States District Judge  
)

**ORDER**

This matter was referred to the Honorable Robert S. Ballou, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), for proposed findings of fact and a recommended disposition. The magistrate judge filed a report and recommendation on April 17, 2017, recommending the court grant the Commissioner's motion to dismiss this action as untimely. The Commissioner argues that plaintiff Amie Nicole Lynch Hicks missed the filing deadline<sup>2</sup> by three days, and the magistrate judge agreed. He reasoned that Hicks' bare allegation of mail service delay is insufficient to rebut the presumption that notice of the Appeals Council's decision was received within five days, see 20 C.F.R. § 422.210(c), and this is not one of the rare cases in which equitable tolling would be appropriate. Thus, the magistrate judge recommended the action be dismissed as untimely. No objections to the magistrate judge's April 17, 2017 report were filed.

<sup>1</sup> Nancy A. Berryhill is now the Acting Commissioner of Social Security and will be substituted for Carolyn W. Colvin as defendant in this case pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

<sup>2</sup> Section 405(g) of the Social Security Act requires an individual seeking review of a denial of benefits to file an action in federal court within sixty days of the mailing of a notice of the Appeals Council's decision. 42 U.S.C. § 405(g).

Nevertheless, the court took the report under advisement and remanded this case to the magistrate judge for an evidentiary hearing to determine whether Hicks indeed received notice of the Appeals Council's decision and complied with the 60-day filing deadline. The magistrate judge held an evidentiary hearing on June 20, 2017. Following that hearing, he issued a second report on August 22, 2017, again recommending this action be dismissed as untimely. The magistrate judge held that, at the evidentiary hearing, Hicks provided no affirmative evidence that she received the Appeals Council's notice of decision more than five days after it was issued on April 15, 2016. Thus, Hicks has not made a reasonable showing sufficient to rebut the presumption that the notice was received five days after it was issued, nor has she established sufficient facts to justify equitably tolling the statute of limitations period, and her claim is untimely. No objections to the August 22, 2017 report have been filed.

Given the evidence adduced at the June 20, 2017 hearing before the magistrate judge, the court is satisfied that there is no clear error on the face of the record and that the magistrate judge's recommendation should be accepted. It is accordingly **ORDERED** and **ADJUDGED** that the Commissioner's motion to dismiss (ECF No. 10) is **GRANTED**, the magistrate judge's two report and recommendations (ECF Nos. 14 & 22) are **ADOPTED in their entirety**, and this matter is **DISMISSED** and **STRICKEN** from the active docket of the court.

The Clerk is directed to send a copy of this order to all counsel of record.

Entered:

10/25/2017

/s/ Michael F. Urbanski

Michael F. Urbanski

Chief United States District Judge